IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 20, 2006 Session

RAY ZUZINEC v. FRANK BARRETT, ET AL.

Appeal from the Circuit Court for Loudon County
No. 7488 Russell E. Simmons, Jr., Judge

No. E2006-00054-COA-R3-CV - FILED AUGUST 15, 2006

Ray Zuzinec ("Plaintiff") purchased a house that had recently had the roof replaced, and that roof still was under warranty. The roof was purchased from and installed by the Barrett Company at a total cost of $7,865.00. After shingles began to fall off the roof periodically, Barrett Company patched the roof at no cost to Plaintiff. Barrett Company refused to replace the roof even after one of Barrett Company's employees allegedly told Plaintiff that the entire roof was installed improperly and needed to be replaced. Plaintiff eventually had the roof recovered at a total cost of $4,000.00. Plaintiff sued Frank Barrett individually and d/b/a the Barrett Company. The Trial Court awarded Plaintiff a judgment for $3,100.00. Defendant appeals. We affirm the judgment of the Trial Court as modified.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Jennifer L. Chadwell, Knoxville, Tennessee, for the Appellant, Frank Barrett, individually and d/b/a Barrett Company.

F. Scott Milligan, Knoxville, Tennessee, for the Appellee, Ray Zuzinec.

OPINION

Background

This lawsuit involves a breach of warranty claim regarding a roof that was installed by the Barrett Company. In July of 2005, Plaintiff filed suit in the Loudon County General Sessions Court against Frank Barrett ("Barrett") individually and d/b/a Barrett Company based upon breach of warranty. Following a trial, the Sessions Court entered a judgment for Plaintiff in the amount of $4,000.00. Barrett timely appealed the judgment to the Loudon County Circuit Court.

A non-jury trial took place on December 2, 2005. Plaintiff testified that he purchased a house in Tellico Village from Johnny Soloman ("Soloman") in May of 2001. Plaintiff claimed that during the negotiations on the purchase of the house, Soloman made it known that the roof recently had been replaced and there was a warranty covering the roof. As a result, "we arrived at a little higher price we had to pay for the home." The roof had been purchased from and installed by the Barrett Company.

Plaintiff first began experiencing problems with the roof in December of 2002 or January of 2003. According to Plaintiff, he heard a noise and when he went outside to investigate, there was a "pile of shingles, maybe four or five or six … that had slid off the roof and fell on the driveway." Plaintiff then called Soloman and requested the information pertaining to the warranty on the roof. The warranty information received by Plaintiff showed Soloman paid over $7,800.00 for the roof and received a limited labor and materials warranty. Plaintiff called Barrett Company and was informed that Plaintiff's "prorated portion of the expense was nine hundred and some odd dollars." Plaintiff was told to send a check for that amount to Barrett Company and the company would send a repair crew out to Plaintiff's house.

Plaintiff sent Barrett Company a check for roughly $900.00, as requested, and a work crew was sent to Plaintiff's house. The work crew patched the roof where the shingles had fallen off. The only person on the repair crew with whom Plaintiff spoke was named Stacey. According to Plaintiff:

> Stacey looked at the shingles that were off of the roof and concluded that they weren't installed properly.…She said that in her opinion the whole roof was probably installed wrong.… She made a phone call back to Barrett Company.… She subsequently told me that the roof was going to have to be replaced and if I would wait until the spring they would take care of it….

Plaintiff then added that Barrett Company never replaced the roof.

After this discussion with Stacey, Plaintiff spoke with another employee of Barrett Company named Laurie Mitchell ("Mitchell"). Plaintiff informed Mitchell of what he had been told

by Stacey about the roof needing to be entirely replaced. Mitchell said "well, I'll talk to Stacey. [Mitchell] called back and said there was never any such thing said." Plaintiff left messages for Frank Barrett to call him, but Barrett never returned his calls. Plaintiff claims he was told that Barrett Company "would only come out and fix other shingles that fell off the roof. They were not going to replace the roof." Plaintiff requested Barrett Company return his check for $900.00, and the check was returned.

More shingles fell off of the roof in late 2003. Plaintiff again contacted Barrett Company and, one or two months later, a repairman named Ray was sent to Plaintiff's house. Ray replaced the shingles that had fallen off of the roof and Plaintiff was not charged for this repair.

Yet more shingles fell off of the roof in the spring of 2004. This time, Barrett Company told Plaintiff that based on the prorated amount of his warranty, he needed to send Barrett Company a check for $1,347.76, which he did.[1] Barrett Company again sent Ray out to Plaintiff's house to replace the shingles that had fallen off of the roof. Plaintiff again requested the return of his check and Barrett Company complied with that request.

After even more shingles fell off the roof in 2004, Plaintiff suffered water damage to the inside of his house. Plaintiff testified that he called Barrett Company when these shingles fell off, but Barrett Company never sent a repair crew to repair the roof. At that time, Plaintiff decided to have the whole roof replaced. Plaintiff contacted Ryan Baxter of JH Development. Plaintiff eventually decided to have the roof recovered, as opposed to replaced, and the cost to have the roof recovered was $4,000.00.

The shingles that were installed originally by Barrett Company were twenty-year shingles. The shingles Plaintiff had installed by JH Development were thirty-year shingles. Plaintiff acknowledged that had the shingles only fallen off one time, he would have been satisfied with those shingles simply being replaced. However, Plaintiff added that the situation worsened over time and "[i]t looked like they were going to continually slide off the roof and I had to get something done."

The next witness was Ryan Baxter ("Baxter"). Baxter has worked in the roofing business for seven years. Baxter currently is self employed, but previously worked for JH Development. While working for JH Development, Baxter inspected Plaintiff's roof after Plaintiff

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[1] According to the warranty information sent to Plaintiff, "[e]ach month and year that your roof ages, your warranty coverage decreases. If the repair is more than the prorated amount of your warranty you will owe up to the prorated amount. The prorated amount that you will have to pay is $1347.76." Barrett Company arrived at this figure by dividing the length of time the warranty had been in effect by the total twenty-year length of the warranty. In this case, that percentage would have been roughly 17.136%. Thus, if the $7,865.00 roof had to be *entirely* replaced, Plaintiff would have been responsible for 17.136% of the total cost, or $1,347.76. It would necessarily follow that if the repair cost was minor, such as $200.00, then Plaintiff should be responsible for roughly $34.27 of that cost. What is left unexplained by Defendant is why, if Plaintiff's total cost for having the roof entirely replaced would have been $1,347.76, Plaintiff was required to pay that full amount up-front before *any* repairs would be undertaken, especially after Barrett Company had already refused to replace the roof.

reported the various problems. When Baxter inspected the roof in late 2004, shingles were missing. According to Baxter, while inspecting the roof he "found that the whole roof was improperly nailed throughout all sides of the roof [and] not just in one area." Baxter explained the problem as follows:

> Well, when you do a roof you have to – there is a certain nail pattern you apply to the shingles, on every package of shingles. And if you don't follow that nail pattern, then the shingles have a higher chance of being blown off the roof.… [The shingles on Plaintiff's roof] were nailed several inches too high which only allowed the nails to go through one set of shingles instead of two sets of shingles like they should have. And some shingles were altogether missing a nail. You are supposed to have four in each shingle and some shingles only had three. And those three were still high nailed.…
>
> I said I could repair the shingles and nail them back down up there, no problem, the ones that had blown off. If I did that the chances were I'd be back at least once a month and repairing and he would have some repair bills and a big headache.
>
> Option number two was he could tear the whole roof off and replace the roof.
>
> And option three which was to re-cover the roof with shingles with nails that were longer to hold – to go through the original shingles and the shingles that I put on there which is significantly less than option number two.

Baxter added that there was no problem with the shingles themselves; the problem was with how they had been installed by Barrett Company. Baxter testified that Plaintiff paid him $4,000.00 for option number two above, i.e., to have the shingles installed by Barrett Company recovered. Although the shingles Baxter installed on Plaintiff's roof were more expensive than the ones they covered up, there was no proof presented as to the overall cost difference.

The final witness was Barrett, who testified that he has owned Barrett Company for forty years. Barrett stated that over the past ten years, Barrett Company has replaced from five to ten roofs pursuant to the warranty. Barrett testified that the warranty provides that the extent of repair or replacement is at the total discretion of Barrett Company. Barrett Company never was paid for any of the repairs made to Plaintiff's roof. Barrett Company sent the check for $900.00 back to Plaintiff because "he raised so much cain at the office." Barrett testified to the several complaints received by Plaintiff and the work performed by Barrett Company at no cost to Plaintiff. On cross-examination, Barrett acknowledged that he never spoke with Plaintiff about the problems Plaintiff was having with the roof, and Barrett never inspected Plaintiff's roof after Barrett Company began

receiving complaints. Barrett stated that the initial cost for installing the roof when Soloman owned the house was $7,865.00.

Following the trial, the Trial Court issued a Memorandum Opinion making the following findings of fact and conclusions of law:

> In this particular lawsuit the plaintiff purchased a residence in May, 2001 that had been roofed by the defendant in August, 2000. The plaintiff indicated that the price of the house was higher because of the warranty that had been given by defendant.
>
> The plaintiff testified that when shingles started to come off around the end of 2002 he got in touch with defendant and was told he had to send a check for $900.00 before a repair crew would be sent. One of the defendant's repair crew indicated that the entire roof needed to be replaced because it had been installed wrong. The crew replaced the shingles that had come off and promised to return in the spring to replace the entire roof. The defendant never came back to replace the roof, and at plaintiff's insistance (sic) eventually sent his original check back without having cashed it.
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> The shingles continued to come off in 2003 and 2004 and defendant was again contacted but never replaced the roof. The plaintiff had [Ryan] Baxter cover the defective roof for a price of $4,000.00, and he testified as an expert witness at trial that he had inspected the whole roof and it was improperly nailed and needed to be replaced or recovered. Plaintiff chose the least expensive remedy to the problem.
>
> The Court finds that the roof was improperly installed by the defendant and should have been replaced under the warranty in the spring of 2003. The warranty did not provide for full replacement cost but for a prorated amount to be deducted from the cost and the Court finds the prorated amount to be $900.00.
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> Based on the above the Court awards judgment to the plaintiff against the defendant in the amount of $4,000.00 less the prorated amount of $900.00 for a judgment of $3,100.00 and court costs.

The Trial Court then entered an Order incorporating the terms of the Memorandum Opinion. Barrett appeals claiming: (1) the Trial Court erred in finding Barrett Company breached the warranty; (2) the Trial Court erred when it determined that there was a contractual obligation owed by Barrett Company to Plaintiff; (3) the Trial Court erred by not finding that any duties arising

under the warranty were fulfilled by Barrett Company; and (4) the Trial Court erred in the amount of damages awarded to Plaintiff. Plaintiff raises one issue and claims he should have been awarded the full $4,000.00 he spent to have the roof recovered.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The warranty provided by Barrett Company is as follows:

> **WE HAVE THE STRONGEST LABOR WARRANTY YOU WILL FIND IN ROOFING**
>
> 1. Barrett Company's maximum liability shall be limited during first year of warranty period to the reasonable labor and material cost as stated hereon. Maximum liability shall be decreased at the beginning of each subsequent year by an amount equal to the quotient derived by dividing reasonable labor and material cost by number of years in the warrant period. The remaining cost shall be the responsibility of the owner. The extent of the repair or replacement is the sole discretion of Barrett Company.
>
> 2. Barrett Company shall have a reasonable time after notification to inspect said problem and to determine if it is caused by material defects, workmanship, or some other source.
>
> 3. Barrett Company shall not be responsible or liable for any damage to the interior or contents of any building or dwelling.
>
> 4. Barrett Company shall not be liable for Acts of God including but not without limitation, hailstorms, strong gale, hurricanes, tornadoes, violent storms, or defects in building structure to which shingles are applied.
>
> This warranty is expressly in lieu of any other expressed or implied warranty. No company personnel, or any other person has the

> authority to assume any additional liability or responsibility for Barrett Company in connection with any roofing materials or labor.
>
> All warranties contained herein and implied warranties shall be void if payment is not made according to payment plan.

Barrett's first issue is that the Trial Court erred when it found Barrett Company had a contractual obligation to Plaintiff. When Plaintiff initially informed Barrett Company of the problem, Barrett Company sent Plaintiff a document which requested payment of $900.00 up front. This document stated:

> Upon receiving your complaint, we are sending this warranty agreement for your signature. This is so that there will be no misunderstanding between us. When we receive this agreement from you we will begin necessary arrangements to take care of your complaint.

Barrett argues that once Plaintiff requested the return of his check for $900.00 and Barrett Company complied with that request, Barrett Company was "no longer contractually liable for any further repairs…." We disagree with Barrett's argument for two reasons. First, Plaintiff is claiming a breach of the initial warranty, not any later agreement that was sent to Plaintiff once he began having problems. Second, pursuant to the warranty Plaintiff would be required to pay a portion of the repair cost based on how long the warranty had been in effect. However, at that particular point in time Plaintiff would have had to pay $900.00 only if the cost of the repair was equal to the original cost of $7,865. Plaintiff's share of the cost for a simple repair would have been substantially less. *See* footnote 1, *supra*. The warranty did not obligate Plaintiff to pay $900.00 up-front for a simple repair, for example a repair costing less than $900, and Barrett Company's request that he pay $900.00 up-front clearly was unreasonable under the warranty. Plaintiff had every right to demand the return of at least a substantial amount of the $900.00 once it became clear that Barrett Company had no intention of replacing the entire roof. The same can be said about Barrett Company's request the next year that Plaintiff pay $1,347.76 up-front before a work crew would be sent to his house to repair the roof. Barrett's first issue is without any merit.

Barrett's next issue is his claim that Barrett Company fulfilled any duties it may have had under the warranty. Barrett points out that the warranty explicitly provides that the "extent of the repair or replacement is the sole discretion of the Barrett Company." Barrett then claims that his company exercised that discretion when it repeatedly sent work crews out to Plaintiff's house to patch the roof. Barrett fails to acknowledge, however, that along with the express contractual obligation under the warranty comes a duty of good faith and fair dealing. As noted by this Court in *Elliott v. Elliott*, 149 S.W.3d 77 (Tenn. Ct. App. 2004):

> Every contract imposes upon the parties a duty of good faith and fair dealing in the performance and interpretation of the contract.

> *Wallace v. National Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); 2 JOSEPH M. PERILLO & HELEN HADJIYAUUAKIS BENDER, CORBIN ON CONTRACTS § 5.27, at 139 (rev. ed. 1995). This duty requires a contracting party to do nothing that will have the effect of impairing or destroying the rights of the other party to receive the benefits of the contract. *Winfree v. Educators Credit Union*, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995).

Elliott, 149 S.W.3d at 84-85.

The only evidence offered at trial regarding the condition of the original roof was that it had been installed wrong and needed to be replaced. There was no evidence to the contrary. The facts certainly do not preponderate against the Trial Court's factual finding that "the roof was improperly installed by the defendant…." Given that the entire roof had been improperly installed, Barrett had a duty of good faith and fair dealing with regard to the warranty. Sending work crews out to Plaintiff's house several times a year to patch areas on the roof while shingles continued to fall off does not constitute good faith and fair dealing under these facts. Thus, even though the warranty gave Barrett Company "sole discretion" regarding the extent of repair or replacement, that discretion had to be exercised with good faith. We believe the Trial Court correctly determined that Plaintiff was entitled to have his improperly installed roof replaced under the warranty.

Barrett's next issue is his claim that the Trial Court erred when it considered Plaintiff's testimony about his conversation with Stacey. Barrett claims Stacey's alleged comments should not have been considered when determining if Barrett was liable to replace the roof. We do not believe the Trial Court relied on Stacey's alleged comments when determining what Barrett Company's obligations were under its original warranty. The Trial Court's determination in this regard was based solely upon the original warranty.

The Trial Court may have relied on Stacey's comments when determining the original roof had not been properly installed. However, Barrett does not argue that Stacey's alleged comments cannot be used for this particular purpose. Even if Barrett did make such an argument, Stacey's comments would have been admissible pursuant to Tenn. R. Evid. 803(1.2)(D) which provides a hearsay exception for a statement offered against a party that is "a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interests regardless of declarant's availability." Without question, before Stacy and the rest of Defendant's repair crew sent to Plaintiff's home could repair the roof, it first was necessary that they identify the problem with the roof. Stacy did so, and told Plaintiff what they had found. We find no error in the admission of Stacey's statements for purposes of determining whether the roof was properly installed in the first place. However, even if this conversation was inadmissible, the only remaining testimony offered at trial was that of Baxter, whose unrebutted testimony was that

the entire roof had been installed improperly. Therefore, even if the Trial Court erred in admitting this testimony, the facts still would preponderate in favor of the Trial Court's conclusion and any evidentiary error would not constitute reversible error.

The final issues surround the Trial Court's award of $3,100.00 in damages. Barrett argues that Plaintiff was not entitled to have thirty year shingles installed. Barrett also claims that since Barrett Company returned both of Plaintiff's checks to him and he received free repairs, Plaintiff is not entitled to any damages. Plaintiff claims that since the original roof cost $7,850.00, and the cost for having the roof recovered was only $4,000.00, he should receive the entire $4,000.00.

The purpose of assessing damages in a breach of contract case is to place the plaintiff, as nearly as possible, in the same position he would have been in had the contract been performed. *Adams TV of Memphis, Inc. v. Comcorp of Tennessee, Inc.*, 969 S.W.2d 917, 922 (Tenn. Ct. App. 1997); *Action Ads, Inc. v. William B. Tanner Company, Inc.*, 592 S.W.2d 572, 575 (Tenn. Ct. App. 1979). The injured party, however, is not to be put in a better position than he would have been in by recovery of damages for breach of the contract. *Adams TV*, 969 S.W.2d at 922.

Had the contract been fully performed by Barrett Company, Plaintiff would have twenty year shingles and he would not have had continuous repairs made to the roof or water damage resulting from the shingles falling off the roof. Plaintiff could have had the entire roof replaced with twenty year shingles and Barrett Company would have been responsible for the entire cost up to $7,865.00, less Plaintiff's prorated amount. Plaintiff chose a less expensive option even though Barrett Company had breached the warranty. The option Plaintiff chose was to recover the roof instead of replacing it. While Defendant complains that Plaintiff now has thirty year shingles on his roof as opposed to twenty year shingles as originally provided, Defendant offered absolutely no proof that the roof in its current condition, even with thirty year shingles, results in the Plaintiff being placed in an overall better position than he would have been had Defendant not breached the contract. When considering all of the facts in this case, we do not believe that Plaintiff has been placed in a better position than he would have been had the warranty not been breached. Plaintiff correctly notes that the "$4,000.00 price was substantially lower than the price initially charged by Mr. Barrett when the defective roof was installed."

The Trial Court determined that Plaintiff's measure of damages should be assessed under the warranty as of the time Plaintiff was required by Barrett Company to pay $900.00 before a repair crew would be sent to repair the roof. While the language of the warranty certainly lends itself to different interpretations, with the one advanced by Defendant being the least plausible, Plaintiff never takes serious issue with the method utilized by the Trial Court other than to say because the $4,000 was less than the original cost of the roof, he should have gotten the full $4,000. As the entire roof originally cost $7,865.00, if Plaintiff's prorated share would have been $900.00 of that amount, then the warranty at the time of Plaintiff's original claim for repairs made under the warranty covered 88.56% of the repair cost. Since Plaintiff's repair cost was $4,000.00, he is entitled to 88.56% of that amount, or $3,542.40. Therefore, we modify the judgment by awarding

to Plaintiff a judgment in the amount of $3,542.40. As modified, the judgment of the Trial Court is affirmed.

Conclusion

The Judgment of the Trial Court is modified by awarding Plaintiff a judgment of $3,542.40 and affirmed as so modified. This case is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Frank Barrett, individually and d/b/a Barrett Company, and his surety.

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D. MICHAEL SWINEY. JUDGE